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IN THE CIRCUIT COURT OF HENRICO COUNTY.

Dec. 18, 1905.

THE CITY OF RICHMOND v. THE COUNTY OF HENRICO, S. M.
DOOLEY AND OTHERS.

CONSTITUTIONAL LAW—*Extension of the Corporate limits of cities and towns—Delegation of legislative authority to the judiciary—Art I., Sec. 5 and Art. III. of the Constitution—Acts 1904, p. 144, Va. Code 1904.*—The Act of May 10, 1904 (Acts 1904, p. 144, sec. 1014a, Va. Code 1904), providing that, when a city or town desires to annex any territory, its council shall declare by an ordinance that it desires to annex certain territory, shall accurately describe the metes and bounds thereof, and shall set forth the necessity for or expediency of annexation, and the terms and conditions upon which it desires to annex such territory, as well as the provisions which are made for its future management; and providing further that the court or judge, before whom the case shall subsequently be brought for further hearing, shall ascertain the necessity for or expediency of such annexation, and whether the terms and conditions set forth in the ordinance are reasonable and fair, and whether fair and just provisions are made for the future management of such territory; and providing further that if he is satisfied of the necessity for or expediency of the annexation, and that such conditions and provisions are reasonable and fair, he shall enter an order for the annexation of said territory; and providing further that if the court or judge shall be of opinion that no annexation is necessary or expedient, the motion to annex shall be dismissed; and providing further that if the court or judge is of opinion that the annexation of only a part of such territory is necessary or expedient, or that said ordinance does not contain fair and reasonable terms, or if he shall be of opinion that more territory shall be annexed than was described in the metes and bounds originally set forth, he shall enter a proper order embodying what he deems reasonable and fair terms, and how much of said territory should be annexed:—is not unconstitutional:

1. In leaving to the court to determine the necessity for or the expediency of the annexation desired;

2. In allowing the court, if it deems that the terms of the ordinance are not reasonable and fair, to embody in its order what it deems reasonable and fair terms;

But so much of the said act as gives the court power to annex other territory than that described in the ordinance is unconstitutional.

CONSTITUTIONAL LAW—*Extension of corporate limits of cities and towns—Art. I., Sec. 5 and Art. III. read in connection with Sec. 126 of the Constitution.*—In annexation proceedings, Article III. and Sec. 5 of

Art. I. of the Constitution of Virginia, requiring that the legislative, executive and judiciary departments should be kept separate, should be interpreted in the light of section 126 of the Constitution, which provides that the General Assembly shall provide by general laws for the extension of the corporate limits of cities and towns; and that no special act for such purpose shall be valid.

ANNEXATION—*When causes may be heard together.*—Where a statute provides for the annexation of territory adjoining a city and a town not adjoining desires to be annexed to that city, the petition of the town desiring to be annexed may be heard at the same time as the petition of the city requesting the annexation of the intervening territory.

Upon the demurrers of the defendants, the terms of which will sufficiently appear from the opinion of the court.

Henry R. Pollard, City Attorney; *Charles V. Meredith*; *James H. Drake, Jr.*, and *Thomas W. Gardner*, for the plaintiff.

Louis O. Wendenburg, Commonwealth's Attorney for Henrico County; *Braxton & Williams*; *Munford, Hunton, Williams* and *Anderson*; and *Christian & Christian*, for the defendants.

HON. G. T. GARNETT, Judge:

After a very full, able and exhaustive argument by counsel representing all interests involved in this controversy and citation of a great many authorities, this matter has been submitted to me for decision, and realizing the magnitude of the interests involved. it has imposed upon me the duty of a most careful consideration and deliberation of the questions presented by the demurrers.

I shall not review the arguments and authorities cited at great length or in detail; but a succinct statement of the results arrived at and my reasons for the same will show, I hope, that they have not been overlooked in the examination made by me.

There are many questions raised by the demurrers filed in the proceedings, but the question above all others, and the one to which the arguments of all the learned counsel were especially directed, and on which the court is called upon to pass at the threshold of its investigation is, "Is the act of the General Assembly of Virginia, approved March 10, 1904, entitled 'An act to provide for the extension of corporate limits of cities and towns,' unconstitutional and void, as being in conflict with section 5, article I.,

and also in conflict with article III., of the Constitution of Virginia?" The other questions raised by the pleadings, while important, are of a minor character and should the defendants succeed in their contention in the first point raised, it will not be necessary to pass upon the remaining questions.

Section 5 of Art I. of the Constitution of Virginia—which is also the Bill of Rights—declares that the legislative, executive and judiciary departments of the State should be kept separate. And Art III. of the Constitution is as follows: "Except as hereinafter provided, the legislative, executive and judiciary departments shall be separate and distinct, so that neither exercise the powers properly belonging to either of the others; nor any person exercise the powers of more than one of them at the same time."

The Constitution, section 126, further provides: "The General Assembly shall provide by general laws for the extension and contraction from time to time of the corporate limits of cities and towns; and no special act for such purpose shall be valid."

It has been conceded, both in the oral and written arguments of this case, that the General Assembly has no longer power to provide by special acts for the extension of the corporate limits of cities and towns. It is further conceded that in order for the corporate limits of cities and towns to be henceforth extended, the legislature in obedience to the mandate of the Constitution must enact a general law conferring upon some other agency power for this purpose.

It is contended by the defendants with much force that, notwithstanding the fact that the legislature cannot now by special act extend or contract the corporate limits of cities and towns, still the power to do so is essentially and purely legislative and has not been changed by the constitutional provision (section 126); and that this function must either be delegated by general law to subordinate legislative bodies; or if it can be exercised under judicial forms, the act conferring such power upon the judiciary must be of such a character that it does not leave to the court the ascertainment of the necessity, expediency, equity or justice of the annexation desired; but it must provide merely for the ascertainment by the court of certain issuable facts,

and upon the ascertainment of such facts, the law then effectuates the annexation *ex proprio vigore*.

On the other hand, the contention of the plaintiff, pressed with equal vigor, is that the distinction between legislative and judicial powers is often shadowy; and while they concede that such functions as are purely legislative cannot be delegated and must be exercised by the legislature alone, they contend that since the General Assembly, by the constitutional inhibition, cannot longer exercise this power, therefore it is no longer purely legislative, if it ever was, but belongs to that vague and numerous class of functions which resemble one department no more than they resemble another, and take their character from the department to which they are respectively assigned by the legislature. *Matter of Cooper*, 22 N. Y. 81; *Pulaski Co. v. Stuart*, 28 Gratt. 872; *Dinwiddie Co. v. Stuart*, 28 Gratt. 531; *Chesterfield Co. v. Hall's Exor.* 80 Va. 321.

And they further contend that even though this be a legislative function, the act of March 10, 1904, in leaving to the court to determine the necessity and expediency of the annexation desired, as well as the ascertainment of the other facts set forth in the act, does not delegate to the judiciary legislative power, but merely presents to the court the finding of certain issuable facts, upon the ascertainment of which the law takes effect *ex proprio vigore*.

There can be no doubt that, if the General Assembly attempted to delegate to the court, or even to a subordinate legislative body, the power to make a general law on the subject of annexation, then the maxim, *delegata potestas non potest delegari* would be applicable, because the General Assembly itself is charged with that function by the express mandate of the Constitution; and the statute in question here is the expression of the legislative will in response to that mandate.

There is great force in the contention of the plaintiff that, where the legislature is given the power by the Constitution to act and no limits are set to the manner of its exercise, the judiciary can not control the manner of its exercise; and that, as in the case at bar, the General Assembly is not only given the power, but commanded to select by general law the agency for the extension and contraction of the corporate limits of cities and towns, the judi-

ciary cannot control the manner of its choice—the Constitution being silent thereon, except in so far as it forbids the General Assembly to hear and decide the questions presented by towns and cities in their requests for annexation. *Goddin v. Crump*, 8 Leigh 154.

I do not feel, however, that I am called upon in this case to decide the general proposition of law as to whether or not, when the legislature is forbidden to annex territory to towns and cities by special act, the power to annex, which was formerly exercised by the legislature, changes its character, and is therefore one that may be conferred upon the courts; for the plaintiffs contend that even if this be a legislative power, still the statute here only assigns to the court the determination of certain issuable facts.

The issue then, sharply drawn, is this:

The defendants contend that the act of March 10, 1904, is unconstitutional because it delegates legislative power to the judiciary:

First: In leaving to the court to determine the expediency and necessity of the annexation desired.

Second: In allowing the court, if it deems that the terms of the ordinance are not reasonable and fair, to embody in its order what it deems reasonable and fair terms.

Third: In giving to the court authority to annex more or less territory than asked for in the petition:

While the plaintiffs contend, as said before, that all the above are issuable facts, upon the determination of which the law takes effect of its own force.

First: As to the expediency and necessity of the annexation.

In considering this point, it will be noted that this was the very question which, in each specific case before the Constitution of 1902, the General Assembly had to inquire into. The constitutional convention was dissatisfied with the method of annexing territory, and therefore required the legislature to surrender its previous powers over the subject. It is admitted that town councils, supervisors and possibly commissioners could pass upon this question, but denied that the court can. It will be observed, however, that under the terms of the act of March 10, 1904, the General Assembly requires that the municipal

council shall first set forth the necessity for or the expediency of the annexation in the form of an ordinance; and then gives to the court the revisory power of approving or disapproving of the action of that body, which is admittedly a legislative body, capable of passing upon political questions. If then it is admitted that the action of the town council (one of the parties to this suit) would have been sufficient, constitutional and legal, in order to settle the question, how, then, can the defendants suffer by having this decision reviewed by a tribunal, accustomed to weigh and hear evidence upon the rights of contesting parties, and before which they may come and show wherein their interests may suffer, and also establish, if possible, that the annexation desired is inexpedient or unnecessary?

I am induced to believe that this is a function rightly left to the decision of the court from the fact that often in the history of the Commonwealth similar powers have been intrusted to the judiciary: for example, the granting of charters of incorporation to private corporations; the granting to the court the power to say when the public service requires a greater number of justices, and to appoint the same: *Ex parte Bassett*, 90 Va. 679; granting to the court special authority in local cases in regard to the purchase of salt; *Dinwiddie County v. Stuart*, 28 Gratt. 596; *Pulaski County v. Stuart, Id.*, p. 872; granting to the court the power to levy taxes for local purposes; *Case of County Levy*, 5 Call, 139; *Ballard v. Thomas*, 19 Gratt. 14; *Chesterfield County v. Hall*, 80 Va. 321, in some of which cases the court was called upon to exercise its discretion in purchasing the amount of salt deemed necessary for county purposes.

In *Ex parte Bassett, supra*, at page 682, the court says:

"For if it be competent for the legislature to submit a matter of local concern to a decision of the voters of a municipality, it is equally competent for it to submit a similar question to the decision or approval of a county court." The statute referred to in this decision is still on the statute books of our State and the jurisdiction of the county court in regard thereto has been transferred to the circuit court. The decision in that case, which is on a question very similar to the one in the case at bar, is a plain declaration that questions concerning the public interests of a

locality may properly be referred to the judiciary. It will be noted, too, that there was a provision of the constitution impliedly allowing the General Assembly to provide by law for additional justices; and in that case, as in the one at bar, the General Assembly saw fit to intrust the function to the judiciary.

Counsel for defendants cite many authorities to sustain their contention, among which are: *People ex rel Shumway v. Bennett*, 29 Mich. 451; *Galesburg v. Hawkinson*, 75 Ill. 153; *Re North Milwaukee*, 33 L. R. A. 638; *Forsythe v. Hammond*, 71 Fed. 443; *People v. Nevada*, 6 Cal. 143; *State v. Simmons*, 32 Minn. 540.

It may be said of some of these cases, in fact, most of them, that they refer not to annexation, but to original incorporation of cities and towns (for example, *Re North Milwaukee*, *supra*, in which the distinction is insisted upon); and that in almost all, if not all, except that same case, there was no constitutional provision requiring a general law for annexation of territory or incorporation of cities and towns. Of the case *People ex rel Shumway v. Bennett*, 29 Mich. 451, it may be noted that the constitution of Michigan, article XV., section 1, provides:

"Corporations may be formed under general law, but shall not be created by special act, except for municipal purposes"—thus impliedly restricting the creation of municipal corporations to one method, namely, by special acts of the legislature. It may be noted, also, that in that case there was no provision for notice or for hearing and that no right to a hearing was given.

As to the case of *State v. Simmons*, 32 Minn. 540, we note that the constitution of Minnesota, section 33, provides:

"The legislature is prohibited from enacting any special or private laws in the following cases:

"7th. For granting corporate powers or privileges, except to cities." Thus it may be seen that the constitution of Minnesota specifically directs that the incorporation of cities shall not be by general law, but by special act, which is exactly contrary to the provisions of our Constitution.

In *Galesburg v. Hawkinson*, 75 Ill., at page 157, it is said: "It is of the essence of a judicial determination that it shall, so long

as unreversed, and not vacated, be conclusive as to the matter involved in the controversy; but it must be admitted that the legislature might, after this decree was rendered, have reversed the decision of the court by fixing, by statute, the boundaries of the cities differently from those declared by the decree;" thus showing that there was no constitutional provision in Illinois requiring annexation to be accomplished by general law. No such concession can be made as to the decree of this court in this case.

In opposition to the above cases, the following are a few among those cited (and examined) to sustain the contention that the matters conferred upon the court are not legislative: *Kayser v. Bremen*, 16 Mo. 88; *State v. Weatherby*, 45 Mo. 17; *State v. Wilcox*, 45 Mo. 458; *Lambert v. Lidwell*, 62 Mo. 188; *Wahoo v. Dickinson*, 23 Neb. 426; *Grusenmeyer v. Logansport*, 76 Ind. 549; *Forsythe v. Hammond*, 68 Fed. 774; *Hurla v. Kansas City*, 46 Kan. 742; *Callen v. Junction City*, 43 Kan. 632; *Eskridge v. Emporia*, 65 Pac. 694; *Ford v. Des Moines*, 80 Iowa 627. (Cases from many other States might be included in this list; for example, Pennsylvania, West Virginia, Ohio and Utah.)

In some of these cases as, for instance, *Ford v. Des Moines*, *supra*, the statute did not give to the court as broad powers as our statute does, while in others, as, for instance, *Wahoo v. Dickinson*, *supra*, and *Callen v. Junction City*, *supra*, almost the same powers were conferred upon the court. The statute of *Wahoo v. Dickinson*, *supra*, directed: "If the court find the allegations of the petition to be true, and that such territory, or any part thereof, would receive material benefit by the annexation, or that justice and equity require such annexation of said territory, or any part thereof, a decree shall be entered accordingly." The inquiry provided for by that statute I conceive to be essentially the same as that provided in ours, and the only difference between that statute and ours is as to the provision in regard to the modification of the ordinance.

In the Kansas cases, the statutes were not appreciably different from ours, and they gave the court express power to modify the ordinance.

Paraphrasing the language of Baker, J., in *Forsythe v. Hammond*, 68 Fed. 774, we may safely venture the assertion that in

those States, *having similar constitutional provisions as ours*, the almost unanimous opinion is in favor of the contention that the questions of whether the annexation of territory to cities and towns is expedient and will promote the interests of the people or not, and whether the territory requested to be annexed in whole or in part, only, should be included in the annexation, are questions of fact or conditions which may properly be left to the court for judicial determination.

Second: As to the power of the court, if it deems that the terms of the ordinance are not reasonable and fair, to embody in its order what it seems reasonable and fair terms.

The statute in allowing to the court to determine whether the terms of the ordinance are reasonable and fair merely affirms to the court the power that it would have had independently of that provision. 1 Smith on Municipal Corporations, 525, 527.

Whether the statute confers upon the court legislative power in allowing it to modify the terms, if not deemed reasonable and fair, is a question upon which I have grave doubts, but on the authority of *Callen v. Junction City*, 29 Kan. 31, and *Hurla v. Kansas City*, 46 Kan. 748, and because of the fact that those doubts have not been resolved, I am induced to declare that this provision does not violate the Constitution.

Third: As to the statute giving the court authority to annex more or less territory than asked for in the petition.

So much of the statute as gives the court power to annex other territory than that described in the ordinance seems to me plainly unconstitutional. The object of these proceedings is to give to all parties an opportunity to be heard. To allow the annexation of territory when the parties occupying the same had no notice would not give them a day in court and would defeat the very objects of the statute; but as the validity of the remainder of the act is not dependent upon this provision, and the good and bad parts are easily capable of separation, this does not affect the general validity of the statute. Cooley on Constitutional Limitations, 246 and following.

As to the objection that the town of Fairmount, or no part of the said town, adjoins the city of Richmond, I do not think it necessary to determine the meaning of the term "adjoining," and consider the objection invalid for the following reason: If the general

annexation scheme, provided by these proceedings, is established, then the town of Fairmount will be adjacent to the part annexed, and it would be a refinement of reasoning which would require that different suits, one following the other, should be brought for the annexation of such territory.

The length of this opinion, already extended beyond the limits of those expected from a *nisi prius* court, prevents me from dwelling upon the other points raised by the demurrers of the defendant. Suffice it to say, however, that after careful consideration of each one of them, in my judgment, the authorities already cited, as well as others too numerous to mention, convince me that they should be overruled; and that the constitutionality of the act, save in the one point referred to, should be upheld.

The decision of this question has been a grave and delicate one, and not unattended by embarrassment and doubt. It has been arrived at after a conscientious and painstaking investigation on my part, in which I have been greatly aided by the able and exhaustive arguments and briefs of the learned counsel. It has been said by an eminent jurist "that when courts are called upon to pronounce the invalidity of an act of legislation, passed with all the forms and ceremonies requisite to give it the force of law, they are to approach the question with great caution, examine it in every possible aspect and ponder upon as long as deliberation and patient attention can throw any new light upon the subject, and never declare a statute void unless the nullity and invalidity of the act are placed in their judgment beyond reasonable doubt. A reasonable doubt must be resolved in favor of legislative action and the act must be sustained. The opposition between the constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other.

"It is but a decent respect due to the wisdom, the integrity and the patriotism of the legislative body, by which any law is passed to presume in favor of its validity, until its violation of the Constitution is proved beyond all reasonable doubt. They are a co-ordinate department of the government with the judiciary, invested with very high and responsible duties, and they legislate under the solemnity of an official oath, which it is not to be supposed that they will disregard."

The act in question here is the result of the intelligent labors of two legislative bodies of this State, and has received the approval of the Governor, thus placing the court under the double obligation to observe the rule above stated, and making it imperative upon the court not lightly to set aside the results of their labors, and while, as said before, the conclusions of the court are not unattended by doubt, this very fact has made it necessary to solve the doubt in favor of the constitutionality of the act and overrule the demurrers, except in the one particular before mentioned, which is accordingly done.